**ISNIN HJ ALIASNIH** A

**v.**

**LAJIM UKIN**

FEDERAL COURT, PUTRAJAYA B
ZULKEFLI MAKINUDIN CJ (MALAYA)
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
MOHAMED APANDI ALI FCJ
RAMLY ALI FCJ C
[CIVIL APPEAL NO: 01(F)-1-01-2014 (S)]
30 JUNE 2014

***ELECTION:*** *Petition - Application to declare election null and void - Allegation of corrupt practice - Corrupt acts committed by campaigner a day before polling day - Whether campaigner an "agent" of candidate - Whether a "polling agent" - Elements of appointment, knowledge and consent - Whether proved - Whether petition to be dismissed - Election Offences Act 1954, ss. 10(a), 11(1)(b) & (c), 14(1)(c) & (d), 14(1A), 32(b) & (c) - Election Petition Rules 1954, rr. 4(1)(b), 4(4)* D E

***WORDS & PHRASES:*** *"any agent" - Election Offences Act 1954, s. 32(c) - Meaning and purport - Whether inclusive of "polling agent"*

In this election petition by the appellant to nullify the election of the respondent as the duly elected State Assemblyman for the constituency of Klias, Sabah in the Thirteenth General Election, an argument was raised that the election was void as the respondent, by the acts of his agent or polling agent ('Norliah'), was guilty of corrupt practice, as such offence was defined in the Election Offences Act 1954 ('the Act'). It was not in dispute that a day before the polling day, *ie*, on 4 May 2013, Norliah was campaigning for the respondent and to that end had distributed RM50 notes and coupons to the voters, with a promise that RM100 more would be given if the respondent was elected. Upon the evidence adduced, the Election Judge however took the view that Norliah was acting on a frolic of her own, and that there was nothing to show that she was then appointed by the respondent as his agent or polling agent, or that the respondent had anything to do with the distribution of the money and coupons. Dissatisfied, the appellant appealed and argued that the Election F G H I

Judge erred in deciding the way she did. It was contended that there was no strict legal requirement that there must be express evidence to prove that Norliah was acting under the instructions of the respondent, and in any case that, as Norliah is an agent of the respondent, there was no necessity to prove consent or knowledge under the third limb of s. 32(c) of the Act. The primary issue that arose was whether, on the facts and in the circumstances, Norliah, who was the respondent's polling agent on the election day (*ie*, 5 May 2013), and the respondent's campaigner and supporter before that, came within the definition of "agent" under the Act as to make the respondent liable for her acts.

**Held (dismissing appeal)**
**Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:**

**(1)** The appellant is justified in raising and relying on the issue of agent to be imputed to Norliah as the appellant is taking the stand that the interpretation of "agent" includes polling agent. (para 12)

**(2)** To make the respondent liable for the acts of Norliah, the appellant must adduce sufficient evidence to establish her appointment as the agent of the respondent on 4 May 2013 before the election day. This is in compliance with the principle as laid down in *Wan Sagar Wan Embong v. Harun Taib* (refd) that mere campaigning by a party supporter for the candidate without the knowledge and consent of the candidate as to the supporter's acts does not make the supporter an "agent" of the candidate. It was therein further held that to prove agency, there had to be an element of appointment wherein there is a nexus or connection between the identified person as the agent and the respondent as the candidate. (para 14)

**(3)** The appellant failed to adduce sufficient evidence that Norliah was an "agent" of the respondent on 4 May 2013. Without proof that Norliah as the campaigner was acting within the scope of her authority as an agent or with instructions and knowledge of the respondent on 4 may 2013, her acts as a campaigner or party supporter during election campaign cannot make the respondent as the candidate liable. (para 15)

**(4)** The Election Judge was correct in holding that Norliah's action on 4 May 2013 was outside the scope of the duty as "polling agent". What Norliah did on 4 May 2013 was her own acts and rightly described as "on a frolic of her own". It must be appreciated that the impugned acts were committed on 4 May 2013 and not on 5 May 2013. The "polling agent" was only required to be on duty on polling day, *ie*, on 5 May 2013, for at least two hours as provided for under the Act. Thus, the impugned acts committed by Norliah on 4 May 2013 before her performance and discharge of her duty as "polling agent" on 5 May 2013 cannot make the respondent liable. (para 17)

**(5)** The appellant failed to provide sufficient facts and grounds that Norliah was an agent for the respondent on 4 May 2013, or that she was the polling agent of the respondent as prescribed under s. 14(1)(c) and (d) of the Act. The appellant also failed to provide sufficient facts and grounds pursuant to rr. 4(1)(b) and 4(4) of the Election Petition Rules 1954 to prove the required nexus to implicate the respondent and void the election under s. 32(b) and 32(c) of the Act. Compliance with rr. 4(1)(b) and 4(4), it ought to be noted, is mandatory. Consequently, it is not known as to how and by whom Norliah was appointed as an agent of the respondent. (paras 18, 19)

**(6)** It has not been shown to the satisfaction of the court and with certainty that the respondent had knowledge of and consented to the corrupt act of Norliah in giving out envelopes with RM50 notes and coupons which can be produced to redeem a further sum of RM100 if the respondent was elected. The Election Judge therefore did not err in holding that there was no evidence to prove that Norliah was acting under the instruction of the respondent when committing the preferred charges on 4 May 2013. (paras 20 & 21)

***Bahasa Malaysia*** *Translation Of Headnotes*

Dalam petisyen pilihanraya oleh perayu ini bagi membatalkan pemilihan responden sebagai wakil rakyat dipilih untuk Kawasan Pilihanraya Negeri Klias, Sabah semasa Pilihanraya Umum Ketiga belas, hujahan telah dibangkitkan bahawa pemilihan adalah tak sah

kerana responden, melalui perlakuan agen atau agen pilihanrayanya, telah melakukan kesalahan rasuah, sepertimana kesalahan tersebut ditakrif oleh Akta Kesalahan Pilihanraya 1954 ('Akta'). Tidak dinafikan bahawa sehari sebelum hari pengundian, iaitu pada 4 Mei 2013, Norliah telah berkempen untuk responden, dan untuk itu, telah mengagihkan wang kertas RM50 serta kupon kepada pengundi-pengundi di kawasan pilihanraya tersebut dengan janji bahawa RM100 lagi akan diberi jika responden memenangi pilihanraya. Atas keterangan yang dikemukakan, yang arif Hakim Pilihanraya bagaimanapun berpendapat bahawa Norliah bertindak atas kehendak dan kemahuannya sendiri, dan bahawa tiada apa-apa pun yang menunjukkan bahawa beliau pada masa itu telah dilantik oleh responden sebagai agen atau agen pilihanrayanya, atau bahawa responden mempunyai apa-apa kaitan dengan pengagihan wang dan kupon tersebut. Tidak berpuas hati, perayu merayu dan menghujahkan bahawa yang arif Hakim Pilihanraya khilaf dalam membuat keputusan seperti yang dibuatnya. Dihujahkan bahawa tidak terdapat keperluan ketat di sisi undang-undang untuk keterangan langsung bagi menunjukkan bahawa Norliah bertindak di bawah arahan responden, dan walau apapun, oleh kerana Norliah adalah agen responden, maka tiada keperluan untuk membuktikan persetujuan atau pengetahuan di bawah jejari s. 32(c) Akta. Isu penting yang berbangkit adalah sama ada Norliah, yang merupakan agen pilihanraya responden pada hari mengundi (iaitu 5 Mei 2013), dan jurukempen dan penyokong responden sebelum hari tersebut, termasuk di bawah takrif "agen" di bawah Akta sekaligus menjadikan responden bertanggungan atas perbuatan dan perlakuannya.

**Diputuskan (menolak rayuan)**

**Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:**

**(1)** Perayu mempunyai justifikasi untuk membangkitkan isu agen perlu dikaitkan kepada responden mengambilkira pendirian perayu bahawa tafsiran "agen" adalah termasuk agen pilihanraya.

**(2)** Untuk menjadikan responden bertanggungan atas perbuatan Norliah, perayu harus mengemukakan keterangan mencukupi bagi membuktikan perlantikan Norliah sebagai agen responden pada 4 Mei 2013, iaitu sebelum hari mengundi. Ini selaras

dengan prinsip seperti yang dikatakan oleh *Wan Sagar Wan Embong v. Harun Taib* (dirujuk) bahawa perbuatan berkempen semata-mata oleh seseorang penyokong parti untuk seseorang calon, tanpa pengetahuan dan persetujuan calon berhubung perbuatan-perbuatan penyokong tersebut, tidak menjadikan penyokong berkenaan agen calon tersebut. Diputuskan di situ selanjutnya bahawa untuk membuktikan agensi, harus wujud elemen perlantikan di mana terdapat *nexus* atau pertalian di antara orang yang dikenalpasti sebagai agen dan responden sebagai calon.

**(3)** Perayu gagal mengemukakan keterangan mencukupi bahawa Norliah adalah "agen" responden pada 4 Mei 2013. Tanpa bukti bahawa Norliah sebagai seorang jurukempen bertindak dalam skop autoritinya sebagai seorang agen atau atas arahan dan pengetahuan responden pada 4 Mei 2013, perbuatannya sebagai seorang jurukempen atau penyokong parti semasa kempen pilihanraya tidak boleh dipertanggungkan kepada responden selaku calon pilihanraya.

**(4)** Hakim Pilihanraya betul apabila mendapati bahawa perbuatan Norliah pada 4 Mei 2013 adalah terkeluar dari skop tanggungjawabnya sebagai "agen pilihanraya". Apa yang dibuat oleh Norliah pada 4 Mei 2013 adalah perbuatannya sendiri dan diperihal dengan betulnya sebagai "on a frolic of her own". Perlu disedari bahawa perbuatan yang dicabar adalah dilakukan pada 4 Mei 2013 dan bukannya pada 5 Mei 2013. Seseorang "agen pilihanraya" hanya perlu bertugas pada hari mengundi, iaitu pada 5 Mei 2013, untuk sekurang-kurangnya dua jam sepertimana yang diperuntukkan oleh Akta. Oleh itu, perbuatan Norliah yang dilakukan pada 4 Mei 2013 sebelum pelaksanaan tugas yang sepatutnya oleh beliau pada 5 Mei 2013, tidak boleh dipertanggungkan kepada responden.

**(5)** Perayu gagal mengemukakan keterangan dan alasan mencukupi bahawa Norliah adalah seorang agen kepada responden pada 4 Mei 2013, atau bahawa beliau adalah agen pilihanraya responden seperti yang diperuntukkan s. 14(1)(c) dan (d) Akta. Perayu juga gagal mengemukakan fakta dan alasan mencukupi di bawah per-per. 4(1)(b) and 4(4) Peraturan-Peraturan Petisyen Pilihanraya 1954 bagi membuktikan

A pertalian perlu untuk mengaitkan responden dan membatalkan pilihanraya di bawah s. 32(b) dan 32(c) Akta. Pematuhan kepada per-per. 4(1)(b) and 4(4), perlu diingat, adalah mandatori. Akibatnya, adalah tidak diketahui bagaimana Norliah dilantik sebagai agen dan siapa yang melantiknya.

B

**(6)** Mahkamah tidak ditunjukkan dengan cara yang memuaskan dan dengan pasti bahawa responden mempunyai pengetahuan atau bersetuju dengan perlakuan rasuah Norliah dalam memberi sampul-sampul yang mengandungi wang kertas RM50
C serta kupon yang boleh dituntut bagi mendapatkan jumlah tambahan RM100 jika responden dipilih. Oleh itu, Hakim Pilihanraya tidak khilaf apabila memutuskan bahawa tidak terdapat keterangan bagi membuktikan bahawa Norliah bertindak di bawah arahan responden apabila melakukan
D kesalahan-kesalahan yang didakwa pada 4 Mei 2013.

**Case(s) referred to:**

*Audrey Karen Barry v. Datuk Dr Yee Moh Chai [2010] 3 CLJ 660 FC* ***(refd)***

*In Borough of Harwich [1880] 3 O'M&H 61* ***(refd)***

E *Mahari Endut v. Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors [2009] 4 CLJ 488 FC* ***(refd)***

*Wan Sagar Wan Embong v. Harun Taib (No 2) [2009] 1 CLJ 457 FC* ***(refd)***

F **Legislation referred to:**

Election Petition Rules 1954, rr. 4(1)(b), (4)

Election Offences Act 1954, ss. 10(a), 11(1)(b), (c), 14(1)(c), (d), (1A), 32(b), (c)

Evidence Act 1950, s. 114(g)

G **Other source(s) referred to:**

Edward Loughlin O'Malley and Henry Hardcastle, *Reports of the Decisions of the Judges for the Trial of Election Petitions in England and Ireland*, vol III, pp 69-70

H *For the appellant - Mohd Hafarizam Harun (Japar Esteban, Muammar Julkarnain & Rizwandeen M Borhan with him); M/s Esteban A'liq & Co*

*For the respondent - Chau Chin Tang (Lawrence Thien & Al Zarefee Mohd Shukor with him); M/s Chau & Thien*

*Reported by Wan Sharif Ahmad*

I

## JUDGMENT

**Zulkefli Makinudin CJ (Malaya):**

### Introduction

**[1]** This is an appeal from the decision of the election judge of the High Court at Kota Kinabalu in which the election petition filed by the appellant (petitioner in the High Court) was dismissed following a full trial. The appellant was the Barisan Nasional candidate in the 13th general election for a seat in the State Legislative Assembly of Sabah for the constituency of Klias (N25) which was held on the 5 May 2013 whilst the respondent was the Parti Keadilan Rakyat ("PKR") candidate. The respondent was declared as the duly elected member of the said constituency of Klias by polling 6,324 against the appellant 6,145 – a majority of 179.

**[2]** The learned election judge dismissed the election petition on the ground that the appellant as the petitioner had failed to produce sufficient evidence to nullify the election. In her judgment she *inter alia* held as follows:

> In my view, the petitioner has not adduced any evidence that has proven to the Court's satisfaction and showed with certainty that the respondent had knowledge of and consented to the corrupt act of the Polling Agent by the name of Norliah in giving out envelopes with RM50.00 note and a coupon which can be produced to redeem a further sum of RM100.00 if the respondent was elected. [See page 48 of the Records of Appeal].

### Agreed Issues To Be Tried Before The Election Judge

**[3]** It is pertinent to note at the outset that both parties agreed to adopt the respondent issues to be tried before the election judge. (See p. 64 of the records of appeal). The learned election judge had also identified Wong Kui En @ Norliah as the "polling agent" constituting the main element to be tried for election offences under ss. 10(a), 11(1)(b), 11(1)(c), 32(b) and 32(c) of the Election Offences Act 1954 ("the Act"). The agreed issues to be tried before the election judge are as follows:

> Issue No. 1
>
> Whether the respondent by his alleged polling agent one Wong Kui En @ Norliah had committed corrupt practice of bribery as defined in s. 10(a) and in contravention of

A s. 11(1)(b) of the Act and as envisaged under s. 32(c) of the Act based on the particulars as pleaded in paras. 3.9, 3.9.1, 3.9.2 and 3.9.3 of the election petition.

Issue No. 2

B Whether the respondent by his alleged polling agent one Wong Kui En @ Norliah had committed corrupt practice of bribery as defined in s. 10(a) and in contravention of section 11(1)(b) of the Act and as envisaged under s. 32(c) of the Act based on the particulars as pleaded in paras. 3.10, 3.10.1, 3.10.2 and 3.10.3 of the election petition.

C

Issue No. 3

Whether the respondent by his alleged polling agent one D Wong Kui En @ Norliah had committed corrupt practices by printing, publishing and distributing handbills which do not bear upon its face the names and addresses of its printers and publisher in contravention of s. 11(1)(c) of the Act based on the particulars as pleaded in paras. 3.9, 3.9.1, 3.9.2, 3.9.3 E and 3.13 of the election petition.

Issue No. 4

Whether the respondent by his alleged polling agent one Wong Kui En @ Norliah had committed corrupt practices by F printing, publishing and distributing handbills which do not bear upon its face the names and addresses of its printer and publisher in contravention of s. 32(c) of the Act based on the particulars as pleaded in paras. 3.10, 3.10.1, 3.10.2, 3.10.3 and 3.13 of the election petition.

G

Issue No. 5

In the event all or any one of the issues listed in paras. 3.1 to 3.4 hereinabove is answered in the affirmative, whether the H petitioner is entitled to the prayers as pleaded in para. 5 of the election petition.

**Submissions Of The Appellant**

**[4]** Learned counsel for the appellant submitted that in the I course of trial, the learned election judge had made a finding of facts as follows:

(i) Norliah was a polling agent for the respondent; A

(ii) There was indeed the giving of RM50 notes and coupons to PW3 and PW4; and

(iii) There was an element of inducement to vote for the respondent. B

**[5]** It was the contention of the appellant that the learned election judge however erred when she decided that Norliah acted on a frolic of her own when she distributed the RM50 notes and coupons on the 4 May 2013, a day before the polling day. It was C also submitted for the appellant that the learned election judge erred when she decided the appellant had failed to prove knowledge and consent of the respondent in relation to the act of Norliah in distributing the RM50 notes and coupons on the 4 May 2013. It is the appellant's case that Norliah is an agent to D the respondent and as such there is no legal requirement to prove knowledge or consent under the third limb of s. 32(c) of the Act. Section 32(c) of the Act provides as follows:

> 32. The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge: E
>
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate. F

**[6]** For the appellant it was contended that he had never pleaded that the said Norliah was the polling agent of the respondent when distributing the RM50 notes and coupons or G that the said Norliah committed the corrupt practices and/or illegal practices in her capacity as the polling agent on the 4 May 2013. The learned election judge failed to consider the fact that on the 4 May 2014 the said Norliah was yet to be the respondent's polling agent. To the appellant prior to the election day the said H Norliah was in fact the campaigner for the respondent during the campaigning period.

**[7]** It was submitted for the appellant that the learned election judge had made a conflicting finding in relation to the said Norliah's campaigning on the 4 May 2013 where at first, the I learned election judge held that the act of the said Norliah in

distributing RM50 notes and coupons was not out of altruism or benevolence as she did not even have a fixed employment. However, in the later part of her judgment, the learned election judge had given a conflicting view by holding that the act of the said Norliah in campaigning and giving out money and coupons with a promise of RM100 to be given if the respondent was elected was clearly outside the scope of her authority as a polling agent and it was on a frolic of her own.

**[8]** It was further submitted for the appellant that since the said Norliah was entrusted as the polling agent of the respondent and PKR as the political party on the election day, it would raise a strong inference that the said Norliah is one of the trusted campaigners, canvassers and/or agents of the respondent before the election day while distributing the RM50 notes and the coupons.

**[9]** It was also submitted for the appellant that it was never the appellant's pleaded case that the said Norliah was the polling agent of the respondent on the 4 May 2013 or that the said Norliah committed the corrupt practices and/or illegal practices in her capacity as the polling agent on 4 May 2013.

**[10]** The appellant contended that there is no strict legal requirement that there must be express evidence to prove that the said Norliah was acting under the instructions of the respondent. The learned election judge should invoke an adverse inference against the respondent under s. 114(g) of the Evidence Act 1950 since neither Norliah nor her election agent was called to testify as witness for the respondent. Failing to call Norliah and/or election agent would suggest that Norliah, as the polling agent of the respondent had committed corrupt practice in connection with the election, specifically for the benefit of the respondent and not on a frolic of her own.

**[11]** Learned counsel for the appellant also impressed upon us that a polling agent is just a division of agency but an agent under election laws is wider than a polling agent. Under s. 32(c) of the Act, it is not necessary for knowledge or consent of the respondent to be proven by the appellant as the petitioner if the corrupt practice was committed in connection with the election by any agent of the candidate which in this case is Norliah. It was the contention of the appellant that the interpretation of "any agent" must include a polling agent.

## Decision

**[12]** Learned counsel for the appellant in one of the grounds of appeal contended that the acts by Norliah in distributing the RM50 notes and coupons on the 4 May 2013 would tantamount to her acting as an agent for the respondent. Learned counsel for the respondent however submitted that the appellant had in fact departed completely from the agreed issues to be tried. This is because the appellant had raised at this appeal stage the issue of "agent" instead of "polling agent". On this point we are of the view the appellant is justified in raising and relying on the issue of agent to be imputed on Norliah as the appellant is taking the stand that the interpretation of "agent" includes polling agent.

**[13]** The question that need to be addressed in this appeal is whether the said Norliah who was the respondent's polling agent on the election day and the respondent's campaigner and supporter before the election day as alleged by the appellant, can come within the definition of agent under the Act and for the respondent to be liable for the acts of Norliah as his agent.

**[14]** We are of the view in any event, to make the respondent liable for the acts committed by Norliah the appellant must adduce sufficient evidence to establish her appointment as the agent of the respondent on the 4 May 2013 before the election day. This is in compliance with the principle as laid down in the Federal Court's case of *Wan Sagar Wan Embong v. Harun Taib (No 2)* [2009] 1 CLJ 457 wherein it was held that mere campaigning by a party supporter for the candidate without the knowledge and consent of the candidate as to the supporter's acts does not make the supporter an "agent" of the candidate. The Federal Court in *Wan Sagar* held that the definitive scope of agency during elections must be identified. There had to be an element of appointment wherein there is a nexus or connection between the named or identified person alleged to be the agent and the respondent as the candidate.

**[15]** It is our judgment that the appellant failed to adduce sufficient evidence that Norliah was an "agent" of the respondent on the 4 May 2013. The learned election judge was right on her finding as to the scope of authority of Norliah as a "polling agent". Without proof that Norliah as the campaigner was acting within

A the scope of her authority as an agent or with instructions and knowledge of the respondent on the 4 May 2013, her acts as a campaigner or party supporter during election campaign cannot make the respondent as the candidate liable.

B **[16]** It is noted the learned election judge in arriving at her decision had cited established authorities on the subject of agency in relation to the trial of election petition. Amongst others she had referred to a passage in the *Reports of the Decisions of the Judges for the Trial of Election Petitions in England and Ireland* by Edward C Loughlin O'Malley & Henry Hardcastle, vol. III and quoting the judgment of Mr Justice Lush in the case of *In Borough of Harwich* [1880] 3 O'M&H 61 *inter alia* at pp. 69-70 as follows:

> An agent is a person employed by another to act for him and on his behalf either generally or in some particular transaction. The D authority may be actual, or it may be implied from circumstances. It is not necessary in order to prove agent to show that the person was actually appointed by the candidate. If a person not appointed were to assume to act in any department of service as election agent, and the candidate accepted his services as such, he E would thereby ratify the agency, so that a man may become agent of another in either of two ways, by actual employment or by recognition and acceptance. The next question is, if agent, what is he agent for? If a person were appointed or accepted as agent for canvassing generally, and he were to bribe or treat any voter, the candidate would lose his seat. But if he was employed or F accepted to canvass a particular class, as if a master were asked to canvass his workmen, and he went out of his way and bribed a person who was not his workman, the candidate would not be responsible, because this was not within the scope of his authority. *And for the same reason, if a person whom the candidate had* G *not in any way authorized to canvass at all for him, were to take upon himself to bribe a voter, the candidate would not be responsible for the wrongful act. No candidate could ever secure a seat, if he were made answerable for the act of unauthorized persons.* (emphasis added)

**[17]** We are of the view the learned election judge was correct H in her decision that Norliah's action on the 4 May 2013 was outside the scope of the duty as "polling agent". What Norliah did on the 4 May 2013 was her own acts and rightly described by the election judge as "on a frolic of her own". It must be appreciated that the impugned acts were committed on the 4 May I 2013 but not on the 5 May 2013. The "polling agent" was only

required to be on duty on polling day, 5 May 2013 for at least two hours as provided for under the Act. Section 14(1A) of the Act provides as follows:

> Every polling agent or counting agent of a candidate appointed under subsection (1) shall act or be present at the polling station or shall attend the counting of votes at the polling station for at least two hours and his replacement shall only be admitted to that polling station on the expiration of the two-hour period.

Thus, the impugned acts allegedly committed by Norliah on the 4 May 2013 before her performance and discharge of her duty as "polling agent" cannot make the respondent liable.

**[18]** It was also contended for the appellant as one of his grounds of appeal that the learned election court judge erred as a matter of fact and/or law by failing to properly address her mind that based on the pleadings of the appellant, it was never the appellant's pleaded case that Norliah distributed the RM50 notes and coupons on the 4 May 2013 in her capacity as the polling agent of the respondent. On this ground raised by the appellant we are in agreement with the contention of the respondent that the appellant as the petitioner had failed to provide sufficient facts and grounds that Norliah was an agent for the respondent on the 4 May 2013 apart from merely making statement that the corrupt or illegal practice was committed by her as an "agent" of the respondent. The appellant has not even proved that Norliah was the polling agent of the respondent as prescribed under ss. 14(1)(c) and (d) of the Act.

**[19]** The appellant had failed to provide sufficient facts and grounds pursuant to rr. 4(1)(b) and 4(4) of the Election Petition Rules 1954 ("EPR") in so far as the nexus required to implicate the culpability of the respondent and void the election under ss. 32(b) and 32(c) of the Act. It must be stated here that compliance with rr. 4(1)(b) and 4(4) of the EPR is mandatory. (See *Mahari Endut v. Dato' Hj Mat Razali Kassim, Pegawai Pengurus Pilihan Raya Bagi Kawasan Dewan Undangan Negeri N15 Ladang & Ors* [2009] 4 CLJ 488; [2009] 5 MLJ 153). It is not known as to how and by whom Norliah was appointed as an agent of the respondent. The appellant had to plead this element of "appointment" in order to allow the respondent to meet his

A case. The Federal Court in the case of *Wan Sagar* had ruled that the principle of agency in election laws although wider should not be extended as to cast the net of agency too wide to include even ordinary party supporters.

B **[20]** The appellant contended that an inference can be drawn to connect Norliah as the trusted campaigner and agent of the respondent before the election day which included the material date of 4 May 2013. We are in agreement with the finding of the learned election judge that there was no evidence to support this C inference at all. It has not been shown to the satisfaction of the court and showed with certainty that the respondent had knowledge of and consented to the corrupt act of Norliah in giving out envelopes with RM50 notes and coupons which can be produced to redeem a further sum of RM100 if the respondent D was elected.

**[21]** The appellant contended that the learned election judge erred in holding that there was no evidence to prove that the said Norliah was acting under the instruction of the respondent when committing the preferred charges on the 4 May 2013. In response E to this contention of the appellant, it is our considered view that the learned election judge did not err as a matter of fact and/or law because the appellant could not prove that there was such an instruction. The appellant tried to implicate Norliah with the text messages received by PW6 from the phone number 0146757076. F However there was no evidence linking Norliah's actions on the 4 May 2013 to the text messages from the phone number 0146757076 alleged to be respondent's phone number. PW6 admitted in court that he was not even sure if that phone number was indeed the respondent's phone number. PW6 testified that he G obtained the phone number from Harris bin Tarip and Awang Ahmad Silim who told him that it belonged to the respondent. The evidence given by PW6 based on what Awang Ahmad Silim and Harris bin Tarip had told him that the phone number belonged to the respondent both of whom were not called as witnesses is in H fact hearsay and not admissible in court.

**[22]** As regards the contention of the appellant that neither Norliah nor the respondent's election agent was called to testify as a witness for the respondent and for that reason an adverse I inference under s. 114(g) of the Evidence Act 1950 should be

invoked against the respondent, it is our considered view that such a contention is untenable in the circumstances of this case. The burden is placed upon the appellant to first prove his case against the respondent. It is settled law in election petition cases that it is for the appellant as the petitioner to establish a *prima facie* case before the respondent is required to answer. (See *Audrey Karen Barry v. Datuk Dr Yee Moh Chai* [2010] 3 CLJ 660 FC). In the present case it was for the appellant to prove who this so-called Norliah was and that she was the appointed agent of the respondent who distributed the RM50 notes and coupons on the 4 May 2013. This the appellant however had failed to prove.

## Conclusion

**[23]** For the reasons abovestated we find no merits in the appellant's appeal. The appeal is therefore dismissed with costs.